

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 MARSHALL DIVISION

4 ALACRITECH, INC.) (CIVIL ACTION NO.

5) (2:16-693-RWS-RSP

6 VS.) (MARSHALL, TEXAS

7) (

8) (SEPTEMBER 4, 2019

9 CENTURYLINK, ET AL.) (3:30 P.M.

10 MOTION HEARING

11 BEFORE THE HONORABLE JUDGE ROY S. PAYNE

12 UNITED STATES MAGISTRATE JUDGE

13
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(Proceedings recorded by mechanical stenography, transcript produced on a CAT system.)

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Good afternoon. Please be seated.

3 For the record, we're here for the motion hearing
4 in Alacritech versus CenturyLink, et al., Consolidated Case
5 No. 2:16-693 on our docket.

6 Would counsel state their appearances for the
7 record?

8 MS. HENRY: Good afternoon, Your Honor. Claire
9 Henry for Plaintiff, Alacritech. I'm joined by Joe
10 Paunovich and Michelle Clark.

11 MR. PAUNOVICH: Good afternoon, Your Honor.

12 THE COURT: Good afternoon.

13 Thank you, Ms. Henry.

14 MR. STEPHENS: Good afternoon, Your Honor.
15 Gil Gillam, Garland Stephens, David Folsom for Intel, also
16 our in-house counsel, John Edwards, is here, as well.
17 Ready to proceed, Your Honor.

18 THE COURT: All right. Thank you, Mr. Gillam.

19 MR. DACUS: Afternoon, Your Honor. Deron Dacus
20 here on behalf of Dell and CenturyLink. And here with me
21 is Brady Cox on behalf of Dell and Frank Pietrantonio on
22 behalf of CenturyLink. We're ready to proceed, Your Honor.

23 THE COURT: All right.

24 MS. SMITH: Good afternoon, Your Honor. Melissa
25 Smith on behalf of Cavium, and I'm joined by Karineh

1 Khachatourian, and we are ready to proceed, Your Honor.

2 THE COURT: All right.

3 MS. KHACHATOURIAN: Good afternoon, Your Honor.

4 THE COURT: Thank you, Ms. Smith.

5 MR. HUA: Good afternoon, Your Honor. Nelson Hua
6 for Wistron, Wiwynn, and SMS. We're ready to proceed, Your
7 Honor.

8 THE COURT: All right. Thank you. Good enough.

9 Let me see, we are here on the Plaintiff's motion.
10 So let me turn it over first to counsel for Plaintiff.

11 MR. PAUNOVICH: Thank you, Your Honor. Joe
12 Paunovich on behalf of Alacritech.

13 We're here today on a motion to set a case
14 schedule in this matter after the conclusion of PTAB
15 proceedings before the Patent Trial and Appeals Board.

16 As Your Honor may recall, this is a case that
17 dates back to 2016, and in December of 2017, the parties
18 had reached a stipulated agreement to stay the case through
19 the final determinations of -- by the PTAB with respect to
20 the IPRs filed by the Defendant group.

21 We did reach that stage, and then had a
22 conversation with Defendants about setting an agreed-upon
23 schedule for the case, at which point we learned that
24 Defendants were unwilling to set a schedule and were
25 seeking to continue the stay in this matter subject to the

1 appeals that are pending from some of those PTAB
2 proceedings.

3 From our perspective, we believe that under the
4 parties' stipulated agreement, the case should proceed to
5 trial at this time. At the time of the stay, we were
6 approximately four months from trial. As I read the
7 briefing, as I understand Defendants' argument, one of the
8 primary criticisms of our request here today is that they
9 are contending that we are seeking to re-open and basically
10 re-conduct the case.

11 I want to be very clear with the Court that that
12 is not at all what we are seeking. The schedule that we
13 had proposed and did not get a response from Defendants on
14 was frankly in an interest to try to reach an agreed-upon
15 schedule that would get us to trial.

16 We would be perfectly comfortable bringing us
17 right back to essentially the four-month schedule that we
18 had to proceed to trial. Most of the discovery that was
19 subject to certain limited disputes that were pending
20 before the Court at the time of the stay has actually been
21 agreed upon in the stipulation, that it would just -- it
22 would be provided on a more speedy track by the Defendants.

23 The proposal that we made was in the hope of
24 reaching an agreed-upon schedule. If Defendants are
25 comfortable with the schedule that they already agreed to

1 in that stipulated stay, we can certainly have this case on
2 track to move very quickly to trial.

3 In terms --

4 THE COURT: Mr. Paunovich, what is your thinking
5 on proposing that we go forward to a trial, even on the
6 cases as to which the PTAB invalidated -- or even on the
7 claims as to which the PTAB found them invalid?

8 MR. PAUNOVICH: Sure. So as it currently stands
9 in the PTAB rulings, there's no universe where we will not
10 go to trial in this matter. There are a number of the IPRs
11 in which claims -- the claims of validity was sustained.
12 Whatever criticisms Intel and the other Defendants have of
13 that, the reality is those petitions have now been vacated.
14 There is no right to appeal on them, and we will go to
15 trial on those claims.

16 And it's not much different than as we understand
17 this Court's typical precedent, assuming prior to stay, if
18 you have a set of asserted claims and some but not all of
19 those claims are preliminarily found to be invalid by a
20 PTAB board, the normal procedure would be to proceed in the
21 absence --

22 THE COURT: By "preliminarily found," you mean
23 just that the IPR was instituted?

24 MR. PAUNOVICH: No, I do not, Your Honor.

25 For example, in the Personal Audio case, this --

1 Judge Gilstrap had actually allowed both claims that had
2 their validity sustained, as well as some claims that had
3 been invalidated at a final written decision before the
4 PTAB to proceed to trial.

5 THE COURT: Are you talking about Judge Clark's
6 opinion?

7 MR. PAUNOVICH: I apologize if I misspoke on -- on
8 the judge that handled that case. But I believe it's the
9 Personal Audio v. Google case here in this district. I
10 thought it was Judge Gilstrap, but I may be mistaken on
11 that.

12 THE COURT: There are a variety of Personal Audio
13 cases, so it's kind of hard to keep up with. But the one
14 that I saw mentioned in the brief was out of Beaumont, but
15 if --

16 MR. PAUNOVICH: You know, I can -- I've got the
17 citation here in my table of authorities. I can give you
18 the --

19 THE COURT: Well, frankly, it doesn't matter. I'm
20 still just trying to figure out what would be the point in
21 staying the case for the PTAB to address these claims if
22 we're just going to go forward the same way regardless of
23 what the PTAB says?

24 MR. PAUNOVICH: Well, part of the reason, we had
25 narrowed at the time of the stay to 16 claims in the case,

1 as Your Honor I'm sure can appreciate. Although the Court
2 required that amount of narrowing, typically parties would
3 narrow further before or at the time of trial.

4 I do expect that in a case like this, it simply
5 would be infeasible in a matter of a week to try a case on
6 the full complement of 16 claims. From our perspective,
7 given the way that some of the decisions had come down,
8 institution decisions at that time, there was some benefit
9 to seeing and understanding what -- how is the PTAB going
10 to weigh in on the remaining asserted claims in this case?
11 And can we -- will we be able to make an informed decision
12 about what claims would be appropriate to ultimately take
13 to trial?

14 It's certainly our perspective on those, many of
15 the claims that were preliminarily found invalid by the
16 PTAB, which remain on appeal, number one, they do still --
17 are still entitled to presumption of validity, but even
18 beyond that, there are some that are very clear as day, in
19 our opinion, will ultimately be reserved and will end up as
20 part of this trial.

21 And we'll --

22 THE COURT: I'm trying to understand the language
23 you're using. When you say preliminarily found by the
24 PTAB, you're referring to the final decisions of the PTAB,
25 but you're calling them preliminary because they're subject

1 to appeal to the Circuit?

2 MR. PAUNOVICH: That's right. That's right. Your
3 Honor, the claims that have been invalidated by the PTAB,
4 by the administrative board, are not canceled immediately,
5 and, in fact, they are -- are still entitled to their
6 presumption of validity pending appeal.

7 That's been held that -- that's been held by a
8 number of Courts. It's -- I think -- we think it's plain
9 as day in the statute. And that to assume that they are
10 invalid at that stage is just not appropriate on this
11 posture.

12 THE COURT: I'm having trouble understanding why
13 we would go to trial on claims that the PTAB has found
14 invalid.

15 You're -- I have never thought that I should
16 assume that the PTAB's findings either way would be
17 reversed. Similarly, we typically do go to trial on claims
18 that the PTAB has allowed to survive, even though they're
19 subject to appeal by the Defendant.

20 MR. PAUNOVICH: Absolutely. And I think part of
21 that relates to the fact that we do have three claims that
22 have been sustained as valid, and that, again, under no
23 universe will those claims not go to trial. And I think
24 what's unique about this case is although some of the
25 claims relate to two different technologies, there is a

1 substantial overlap in the documents and witnesses and
2 claims, frankly, including the invalidity claims that will
3 be raised in this case.

4 And so the -- the notion that we would go to trial
5 on those claims that have been sustained as valid and then
6 possibly after an appeal that may not conclude for as much
7 as 12 to 15 months, then come -- turn around, come back,
8 re-conduct discovery, and hold a second trial on those
9 claims that come out of those appeals would be a
10 significant duplication of Court and party resources.

11 We -- the very same witnesses that we deposed in
12 this case and the witnesses from our end that were deposed
13 speak to and testify about both of these technologies and
14 the same patents and claims. Although the technologies
15 have some -- do have differences, ultimately, we're going
16 to be presenting what is largely the same body of evidence
17 at trial. And so under that circumstance where we do have
18 surviving claims and other claims that should be tried
19 along with those claims, we do think it's appropriate to
20 try them at the same time.

21 THE COURT: Which can also be done if the case
22 remains stayed until the Federal Circuit acts on the
23 appeals from the PTAB.

24 MR. PAUNOVICH: That's certainly true, Your Honor,
25 and part of the reason that although the parties'

1 stipulated agreement was not that it -- the stay would
2 continue through the time of appeals but rather a
3 negotiated and stipulated stay was that it would end at the
4 conclusion of the -- where we received final written
5 decisions on the last of their final IPRs.

6 The -- we never agreed to stay the case through
7 the conclusion of appeals to the Federal Circuit, and part
8 of the reason is some of the factors that we addressed
9 anticipating what the Defendant group would address in its
10 brief. Number one, that there would be no simplification
11 of issues here. We are still going to present what amounts
12 to essentially the same body of evidence, documents,
13 witnesses, et cetera, at trial, whether it's on the
14 sustained claims or a combination of the sustained claims
15 and those that remain on appeal.

16 There is no claim construction or invalidity
17 defense that will ultimately be resolved on this appeal
18 that would not also be subject or represented in this
19 trial. In fact, I'm not aware of any claim construction
20 position that remains in dispute.

21 This Court, as you know, as Your Honor has
22 previously ruled, claim construction is complete in this
23 case. We've substantially completed discovery in this
24 case. We completed expert reports. We were in the midst
25 of taking expert depositions, and just four months out from

1 trial at the time when we agreed to a limited stay through
2 the time of final written decisions.

3 This is consistent with how other -- other Courts
4 have handled this before. For example, the Olaplex/L'Oreal
5 trial, that happened just a few weeks ago in the District
6 of Delaware in which one of the two patents had every
7 single claim invalidated. It nevertheless proceeded to
8 trial for the very same reasons that we're stating here,
9 that the claims are still entitled to a presumption of
10 validity. There were other claims, part of a second
11 patent, that remained valid, had not been invalidated by
12 the PTAB, and the Court found it appropriate under that
13 circumstance, given all the other factors that the Court
14 obviously considers in kind of weighing whether or not
15 there should be a stay, to proceed to trial.

16 And there's a bit more here, Your Honor. Part of
17 our negotiated stay was that it would go through the final
18 written decision, and the only way a stay would continue is
19 if the party seeking that stay demonstrated good cause. We
20 don't believe that Defendants can demonstrate that on any
21 of the factors that would -- the Court would typically
22 consider in issuing a stay. There's no hardship to
23 Defendants. They're going to have to go to trial anyway.
24 They're going to have to contend with and deal with this
25 evidence, documents, witnesses, et cetera.

1 There's simply no reason to put off under this
2 circumstance where the prejudice to Alacritech is
3 significant. We've waited 19 months longer than what we
4 expected. We think the statistics that were presented by
5 the Defendants are incorrect, that at the earliest, we're
6 looking at 12 to 15 months from now. And if we stay
7 everything until that time, we're in essence agreeing or
8 implementing a stay that by the time we would get to trial
9 in this matter, it's going to be in excess of three years.

10 THE COURT: You know, your argument only makes
11 sense to me if I conclude that going to trial on all the
12 claims, those that the PTAB found invalid and those that it
13 didn't, involves pretty much the same evidence and the same
14 investment of time. And is that what you're contending?

15 MR. PAUNOVICH: I do think that there is a
16 substantial overlap -- we believe and have stated there is
17 a substantial overlap in the documents and witnesses that
18 we would present regardless of whether the sustained claims
19 go to trial now by themselves or with a broader set of
20 claims that remain subject to the appeal.

21 THE COURT: So you have the same experts on all of
22 the 16 claims that you had narrowed your case to?

23 MR. PAUNOVICH: That's right, Your Honor. We have
24 two experts that will be testifying at trial, Dr. Kevin
25 Almeroth and Mr. Lance Gunderson, our technical and damages

1 experts respectively. They did provide opinions on each of
2 the claims. They would be presenting substantially the
3 same opinions at trial, independent of which of these
4 claims ultimately go.

5 Part of the reason, though, we do believe it's
6 important that these be tried together is ultimately it
7 does come down in -- on some level to a damages base.

8 There is -- although we believe that it's not
9 nearly as sort of black and white in terms of the split
10 between the two technologies that are at issue, it's -- you
11 know, frankly, there's been more of the products that have
12 been sold that include one of the technologies than the
13 other. And so ultimately, presenting on one technology at
14 trial which relates to certain of the claims and leaving
15 the other out really could lead to all sorts of problems in
16 a second trial.

17 THE COURT: Well, I was following you right until
18 the end.

19 You're -- obviously, that was going to be the next
20 question is how are you going to handle the damages to
21 separate out the damages relating to the claims that have
22 been invalidated and those that haven't in the event that
23 you lose the appeal?

24 MR. PAUNOVICH: Absolutely, Your Honor.

25 The Federal Circuit's recently spoken to this in

1 the WesternGeco decision in which the Federal Circuit said
2 you need to look at and assign -- you need to ask the jury
3 to assign damages on a patent-by-patent, claim-by-claim
4 basis so that ultimately they're able to determine if in
5 these sorts of concurrent PTAB proceedings, if something
6 gets invalidated down the way on appeal or what have you,
7 you can go back and say, all right, what is the ultimate
8 damages that are appropriate here?

9 THE COURT: And is that the way your damages
10 expert reports have been written so far?

11 MR. PAUNOVICH: Well, actually, how it's addressed
12 and just to use as an example, since I tried the
13 Olaplex/L'Oreal case here just recently, what we did in the
14 verdict form, and I think this is becoming more -- the
15 practice and norm subject to the WesternGeco precedent, is
16 that on your verdict form, you would ask the jury to assign
17 a damages award with respect to each patent that's in suit,
18 and then commit to the Court -- and we -- there's fairly
19 common jury instructions for this to allow the Court to
20 remit if appropriate down to a lower amount.

21 If -- if, for example, there was one of the
22 patents because of its issue date or an expiration date
23 might be subject to a lower damages amount but that patent
24 ultimately gets invalidated, you can go back to the verdict
25 form and say, well, for this particular patent, it was this

1 amount of damages, and it -- it applies to this particular
2 period. I can pull that out. And I understand and know,
3 you know, what my remaining damages are.

4 THE COURT: My question is, have your experts
5 written their opinions in that manner?

6 MR. PAUNOVICH: Yes, Your Honor, they have.

7 THE COURT: Okay.

8 MR. PAUNOVICH: There are -- there are schedules
9 for each of the patents that apply to the relevant periods,
10 and I would be able to provide opinions directly from the
11 reports based on that.

12 THE COURT: All right. If you are given a choice
13 of proceeding to trial on the claims that have survived the
14 PTAB or having the case stayed pending the Federal
15 Circuit's review of the PTAB's rulings, which would you
16 elect?

17 MR. PAUNOVICH: I hope that's not a question I'm
18 asked to answer, but you're asking me it.

19 We don't think it would be -- ultimately, we think
20 this is an up or down decision, that we should be going to
21 trial on the complete complement of claims or that it
22 should be stayed through the time of the Federal Circuit
23 deciding the appeals. We think that there's lots of
24 reasons why it's appropriate to proceed now, not the least
25 of which is the significant prejudice to Alacritech, the

1 fact that we could legitimately end up in a situation where
2 I fully respect the positions the Defendants have advanced,
3 but going to trial potentially on just video deposition
4 testimony is not a way to try a case.

5 We have -- we filed our case back in 2016. We
6 agreed to an abbreviated and short stay through the final
7 written decisions. Our client, who's approaching 80 years
8 old, as well as his co-inventors, would like to have their
9 day in court.

10 They were able to succeed in maintaining the
11 validity of at least some of the claims, and because of the
12 duplication in documents and witnesses and the fact that
13 it's not going to require new expert reports or things of
14 that nature to address that disparity or -- or frankly to
15 address any outcome that might happen in the Federal
16 Circuit, that can all be dealt under WesternGeco in the
17 verdict form, we would respectfully request that the Court
18 set a schedule and allow us to go to trial now.

19 THE COURT: Okay. I have not -- I have not
20 forgotten my question. Have you?

21 MR. PAUNOVICH: No, Your Honor. We would -- if
22 that is the only option, we would prefer to stay the case
23 through the Federal Circuit appeal.

24 THE COURT: Okay. Tell me, the last thing I
25 wanted to get from you before we hear from the Defendants,

1 after which I'll give you a chance to respond, is if we
2 proceed in the fashion that you're proposing, how would we
3 ever get the efficiency that the PTAB is supposed to
4 provide to us unless they end up invalidating all of the
5 claims? What -- what efficiency have we gained from these
6 IPR proceedings if we just go forward with everything,
7 notwithstanding the PTAB's ruling?

8 MR. PAUNOVICH: Well, the point that I raised
9 first off, Your Honor, that I do think that Alacritech --
10 although we're not here to acknowledge strengths or
11 weaknesses in any particular claims, I think we do have an
12 understanding of where at least on those claims that have
13 been preliminarily invalidated by the PTAB, that -- you
14 know, which we think stands a very high likelihood of being
15 reversed on appeal.

16 And I would expect that we will be prepared to
17 narrow the asserted claims in this case further so that
18 we're not just sort of spinning our wheels on claims that
19 maybe are less likely to be reversed on appeal.

20 THE COURT: Okay. And give me a short version of
21 the error that you're asserting to the Circuit to get the
22 PTAB reversed.

23 MR. PAUNOVICH: For example, there are three
24 claims in which the Defendant groups in their IPRs
25 acknowledged that there were particular claim limitations

1 which were simply absent from the prior art, full end stop,
2 admitted by their expert in the IPR proceedings.

3 And instead, what they did was attempt to fill the
4 gap, the absence of those limitations in the prior art by
5 saying, well, I'm a person of ordinary skill in the art,
6 and I would have simply invented not one, not two, but
7 three complex scripts that would address and ultimately
8 disclose -- they would be these elements that are
9 acknowledged as missing from the prior art.

10 This was all under testimony of their expert.
11 Ultimately, the Defendants' group -- the groups that were
12 filing the IPRs were able to urge the PTAB board to adopt
13 this line of reasoning, which was fundamentally
14 inconsistent, has been repeatedly overturned, outright
15 reversals, not remands, but overturned by the Federal
16 Circuit where they say, look, you have not met your burden
17 when you've acknowledged a missing limitation and you
18 simply backfill it through expert testimony purporting to
19 be a person of ordinary skill in the art. Rather in that
20 instance, you've had a fundamental dispositive failure of
21 proof. And the appropriate remedy in that circumstance is
22 an outright reversal.

23 We -- we believe very strongly in the case law
24 that we've cited and now briefed to the Federal Circuit
25 that this will be a valid basis for an appeal, at least on

1 those three claims, among others.

2 I wasn't prepared to fully address all of the
3 merits of those IPR appeals here, but that one stands out
4 as particularly salient to the discussion we're having here
5 right now, because I think there's a very real world under
6 the precedent of our Federal Circuit that those claims are
7 coming back fully alive and will be part of the trial in
8 this matter.

9 THE COURT: All right. Thank you, Mr. Paunovich.

10 MR. PAUNOVICH: Thank you, Your Honor.

11 MR. GILLAM: Your Honor, Gil Gillam. I'm here
12 speaking on behalf of Intel but also on behalf of the rest
13 of the Defendants, as well.

14 Although if there are certain questions directed
15 to each one of the Defendants, they would be happy to
16 answer those if there are individual questions.

17 Whatever the stipulation was and whatever it
18 meant, Your Honor, we surely did not stipulate to go to
19 trial on claims that were held to be invalid by the PTAB.

20 And I think what the Court asked Mr. Paunovich a
21 moment ago is -- is certainly instructive of the problem
22 that we face here as we sit here right now.

23 What was the purpose of the stay if what the PTAB
24 did doesn't mean anything? And that's what they're asking
25 us to do here. Of the 13 -- of the 16 claims that they

1 asserted in this case, 13 were held -- it's not a
2 preliminary determination, it's a final written decision of
3 the PTAB -- they were held to be invalid.

4 Now, the only appeals that have been -- that we're
5 concerned with here today, because timing seems to be of
6 some import to the Plaintiffs in this case, the appeals
7 that we're concerned about here today are the appeals of
8 the Plaintiffs of those decisions. Now, there's some other
9 appeals that we've talked about in the briefs of being
10 things we may appeal or things like that, we're not
11 concerned about those.

12 The only appeals we're concerned about today and
13 that we're asking that the Court continue the stay on are
14 the appeals raised by the Plaintiffs as a part of their
15 appellate process and what was done with the PTAB.

16 THE COURT: And are you suggesting that those
17 appeals are on a shorter track than the Defendants'
18 appeals?

19 MR. GILLAM: We do believe, Your Honor, that --
20 that when you -- I think the briefing is somewhat unclear
21 on that. We believe that when you look at the time table
22 for the appeals, that the time -- the time table for the
23 appeals, they should be resolved probably within 9 months.
24 They seem to think it's 12 to 15 months.

25 But whether it's 9 months or it's 12 months, we

1 don't believe that's a significant difference insofar as
2 these particular appeals are concerned.

3 THE COURT: Can you address the argument that
4 going to trial on the claims that survive would not be
5 materially different in terms of the expense and effort as
6 going to trial on all of the 16 elected claims?

7 MR. GILLAM: Well, first of all, Your Honor, I
8 think it -- it's of some importance that both the Plaintiff
9 and the Defendant seem to believe that it's not reasonable
10 to go to trial on those three as opposed to all 16.

11 But taking that and putting it aside for a moment,
12 there is some overlap in the patents, and it's similar
13 enough that we believe what the Fed Circuit will have to
14 say with respect to these appeals -- and I'm not well
15 versed in what the appellate issues are -- but what the
16 Fed Circuit does have to say with respect to these
17 particular appeals are going to be important with respect
18 to what this Court does with these particular patents.

19 I think all these claims have a priority date that
20 go back to the same provisional patent. I think that's
21 true. And so we think it will be important to hear what
22 the Fed Circuit has to say. We think it doesn't make any
23 sense to -- particularly in the short time table that we're
24 dealing with here -- to go and have a -- what appears to be
25 nothing more than a mishmash of potential claims that may

1 be -- we believe, by the way, Your Honor, that there's a
2 very small chance that these -- that these claims will be
3 reversed on appeal or that the decision of the PTAB will be
4 reversed. We think they'll be -- they'll all be withheld
5 obviously.

6 That being said, what we're talking about here
7 today, at least what I've heard is, is that let's -- let's
8 let them choose and decide amongst these other -- let's
9 first go with all 16 claims, and then let us decide what
10 some other claims -- or what might be held within the
11 middle of these claims, which ones we'll choose and things
12 like that.

13 None of that makes any sense with respect to
14 what's already been done, and that's with respect to claims
15 that have been held invalid by the PTAB. None of it makes
16 sense at all.

17 THE COURT: Well, do you dispute the argument that
18 Mr. Paunovich made that the Court in Delaware recently
19 decided that it was appropriate to go to trial on both
20 claims that survived and claims that didn't while the
21 appeals from the PTAB were pending?

22 MR. GILLAM: I read that case. Your Honor, I
23 thought it was called Liqwid versus L'Oreal, and that was
24 the one that was in the brief. The fact situation in that
25 particular case seemed to be different than what we're

1 talking about here. It seems that that was a two-patent
2 case but also a case dealing with misappropriation of trade
3 secrets as well as breach of contract. The time table was
4 completely different than what we're talking about here. I
5 think only one of the claims -- or one of the patents that
6 were asserted had been held invalid. The other one I
7 believe was held to be valid.

8 The parties were direct competitors in that case,
9 whereas they're not in this particular case. And so why
10 the Court made the determination to go forward in that
11 case, I don't know. It seems like the magistrate's opinion
12 with respect to his decision was that he simply disagreed
13 with what the determination of the PTAB was. The District
14 Court seemed to agree with that, and they decided to go
15 forward.

16 I have never seen something like that in this
17 district at all, and that is going forward on a case which
18 has been determined to be -- or with a patent that's been
19 determined to be invalid by the PTAB.

20 THE COURT: What do you say about the Personal
21 Audio decision?

22 MR. GILLAM: The Personal Audio decision, Your
23 Honor, was a decision -- I think it was a Judge Clark
24 decision, and from my reading of Personal Audio, the facts
25 in that particular case, again, were somewhat different

1 than what we're talking about here.

2 In that particular case, unlike this one, there
3 were two-thirds, I believe, of the patents that were
4 challenged in that case were held to be valid, or not
5 unpatentable or not invalid by the PTAB as opposed to what
6 we have here.

7 Here we have 13 of the 16 which were held to be
8 invalid. The stage of the litigation was different than
9 what we're talking about here. At the time of that
10 decision, the -- I don't think any fact discovery had
11 occurred. The Plaintiff waited less than two years to file
12 their lawsuit, as opposed to 14 years that we have here.
13 And so the decision was -- or rather the fact situation was
14 completely different than what we have in this particular
15 case.

16 So we believe that Personal Audio is
17 distinguishable from what we have here.

18 THE COURT: But is it your understanding that
19 Judge Clark's decision in Personal Audio was to go to trial
20 on patents that had been invalidated by the PTAB?

21 MR. GILLAM: I don't think that's what the
22 decision was. I think he said we're going -- we're not
23 going to continue to stay the case. Now, where it went
24 from there, I'm not sure, but I don't believe they went to
25 trial on that. I believe that case was resolved.

1 THE COURT: Okay. Well, take to me if you would
2 about the argument that the -- one way or the other these
3 three claims that have not been invalidated are going to
4 end up being appropriate for trial and that a trial on the
5 whole claim set would be no more effort than a trial on the
6 three.

7 MR. GILLAM: Well, it certainly would be, Your
8 Honor. We're talking about -- and I'll point out this, for
9 example.

10 You asked Mr. Paunovich whether or not the expert
11 report distinguished between the -- between the patents.
12 We did a quick review over here, and I don't believe the
13 expert report does distinguish between the patents.

14 THE COURT: You're talking about the damages --

15 MR. GILLAM: Yes, sir.

16 THE COURT: -- expert's?

17 MR. GILLAM: The damages report.

18 And so we don't have a damages report that -- that
19 does distinguish on a patent-by-patent basis. I believe it
20 is as it exists in its current form. It's simply -- pardon
21 me -- it's simply a damages number is what they have and an
22 analysis of how they got there.

23 And so the other issue that I would point out
24 in -- with respect to that is that we're talking about two
25 patents versus six patents. They asserted six patents in

1 this case. We're only talking about the two patents, and
2 most of the products are out by way of the invalidity
3 finding of the -- of the PTAB.

4 And so -- well, I think we're talking apples and
5 oranges here with respect to trying to try those cases
6 together, the ones that were held to be invalid and the
7 ones that we -- that they contend exist or continue to be
8 valid or available to be tried today.

9 THE COURT: All right.

10 MR. GILLAM: And I'm happy to address the other
11 factors for the Court if you want me to. Insofar as the --
12 the prejudice, there was a discussion of Mr. -- of their
13 Plaintiff or their lead inventor who's nearing 80 years
14 old. I mean, at the time that they filed this particular
15 lawsuit, they waited some 14 or 16 years before they filed
16 it -- before they asserted these patents. It hasn't been a
17 long -- it has not been a lengthy stay from the time of
18 the -- of the stay and --

19 THE COURT: When you talk about the 14 years,
20 you're just saying from issuance of the patent?

21 MR. GILLAM: From the time of the -- from the time
22 they had the ability to assert these patents because they
23 felt that they were infringed.

24 In fact, the Court -- this Court did an analysis
25 of the -- of the prejudicial factors when it denied a

1 motion to stay that was urged early on in this case. And
2 that was in -- it was in this very case. And this Court
3 found that there was not substantial prejudice as it
4 existed at the time. And the situation hasn't changed now
5 from what it was back then, other than the man is a couple
6 of years older.

7 Now, he sat for a three-day deposition and did
8 fine there. You know, at what point in time do you get
9 old? Certainly he's a couple years older than what we
10 were at a couple of years ago. But we have no evidence
11 really that's been presented as to any ailment that he's
12 got, any -- any issue that he has which is going to make
13 him incapable of being there for trial. And we certainly
14 have offered or will offer the -- the right of these folks
15 to do a preservation deposition if they want to do it.

16 But we don't see that there's any prejudice to
17 them based upon where we sit today.

18 THE COURT: All right. We'll deal with that
19 afterwards. Don't worry about it. It works just as
20 well --

21 MR. GILLAM: You're going to need a new one, Your
22 Honor. This one looks a little bit chewed up.

23 THE COURT: There will be a small fine.

24 MR. GILLAM: It won't be the first time, Your
25 Honor.

1 THE COURT: That's fine. I don't know if any of
2 the other Defendants want to be heard. If not, I'll give
3 Mr. Paunovich a chance to answer that.

4 Mr. Stephens?

5 MR. STEPHENS: Your Honor, thank you.

6 Just briefly, I want to mention the issue about
7 whether or not there's any increased burden by trying these
8 separately as opposed to together. In other words, are all
9 the issues the same? Is all the evidence the same?

10 And Mr. Gillam, of course, already addressed that.
11 I just want to speak briefly to the issue for Intel in
12 particular.

13 The very large majority of products that are
14 accused against -- Intel products that are accused of
15 infringing include a feature that is only accused on
16 patents that have been held invalid. So there's a very
17 small number of products that are at issue in the three
18 claims that were not considered by the PTAB and a much,
19 much larger number of individual products that are accused
20 under the patents that were held invalid.

21 And so that would require considerably more
22 witnesses, a bunch of additional documentary evidence,
23 additional expert testimony because these features are
24 completely different and independent and deployed in
25 different products, even though they work, you know,

1 related to the same underlying protocol. So they're not
2 unrelated, but they're deployed completely separate in the
3 products. So there is a pretty substantial mismatch in
4 terms of the evidence that will be presented at trial.

5 That's all I wanted to say, Your Honor.

6 THE COURT: Mr. Stephens, can you address your
7 understanding of the expected timeline for the appeal that
8 the Plaintiffs have pending in the Circuit now?

9 MR. STEPHENS: Yes. What Mr. Gillam said is
10 completely consistent with my understanding. We filed
11 those briefs. Our opposition briefs were filed about two
12 weeks ago, I believe. So I think that Alacritech's reply
13 briefs are due at the end of October, and the last one will
14 be filed the first week -- I'm sorry, maybe the first week
15 of October, and the last one will be filed the first week
16 of December.

17 So we believe that roughly nine months is the
18 right number. It is possible it could take a bit longer,
19 but we don't think it's going to take 15 months. I think
20 12 months would be at the outside. It's also possible that
21 these decisions will come down quickly because the PTAB
22 appeals are often decided via Rule 36 where there's no
23 written decision. So we think there's a very high
24 likelihood that that could happen here too. So it actually
25 could happen substantially quicker than nine months.

1 They will all be argued together, by the way. So
2 we think that the timeline is relatively abbreviated.

3 THE COURT: All right.

4 MR. STEPHENS: Thank you, Your Honor.

5 THE COURT: Thank you, Mr. Stephens.

6 MR. COX: Your Honor, Brady Cox for Dell. I just
7 want to address real briefly a question you asked about
8 overlap of evidence as it applies to Dell specifically.

9 We have products from different suppliers that are
10 accused of infringement in this case that have different
11 features that are accused of infringement. The Broadcom
12 products that Dell uses and that are accused of
13 infringement are only accused based on the features that
14 are at issue with the patents that currently stand
15 invalidated.

16 And so whether those products come in or not will
17 vary depending on if we're trying the, you know, surviving
18 claims versus all the claims. And Dell also has
19 counterclaims for breach of contract alleging that these
20 Broadcom products are licensed, and I think how those
21 counterclaim are presented may vary depending on if the
22 Broadcom products are in or out.

23 THE COURT: All right. Thank you, Mr. Cox.

24 MR. COX: Thank you, Your Honor.

25 THE COURT: Mr. Paunovich?

1 Oh.

2 MR. GILLAM: One other thing, Your Honor. I did
3 not address the question of the reopening of evidence or
4 what has been proposed, and I don't want to take the
5 Court's time on that unless the Court is in the process
6 of not continuing the stay in this case. We would have --
7 would have something to say about that in the event that
8 the Court makes that determination.

9 THE COURT: Well, this would be the time to
10 address that.

11 MR. GILLAM: Well, the problem is, Your Honor,
12 I've heard what Mr. Paunovich said a few moments ago, but
13 the -- the proposed schedule that they have issued in this
14 case or rather that they have proposed in this case is
15 really about two months of unfettered discovery is what
16 they've got. They've got two months of fact discovery
17 built into their schedule.

18 Now, at the time that this case was stayed, fact
19 discovery was closed, completely closed. A lifting of the
20 stay takes us -- or should take us back to the status quo.

21 THE COURT: And I think Mr. Paunovich said that
22 he'd be willing to accept that.

23 MR. GILLAM: Well, and that's -- that's fine, Your
24 Honor, because the only thing that the stipulation agreed
25 was that within 45 days of the stay ending, that the

1 Defendants would provide updated financial information to
2 reflect sales and revenues relating to the accused products
3 received during that time period. And that's all we agreed
4 to. And so that's the deal.

5 So we would not agree to anything beyond that, and
6 if the Court is of a different opinion as to where we're
7 going today, then we certainly would have the
8 opportunity -- or want the opportunity to talk that
9 through.

10 THE COURT: All right.

11 MR. GILLAM: Thank you.

12 THE COURT: Thank you, Mr. Gillam.

13 MR. PAUNOVICH: Your Honor, I have a few points
14 I'd like to address, but I'll start with the last one
15 raised by Mr. Gillam.

16 The stipulation, Docket Entry 449, included not
17 just a supplement of financials, but also in Paragraph 8 at
18 Page 2, Intel had agreed to provide supplemental evidence
19 relating to certain additional products including one or
20 more accused ethernet controllers sold from 2010 once the
21 stay was lifted. This was part of the negotiated
22 stipulation.

23 There were a handful of limited -- discovery was
24 not fully closed, as Mr. Gillam had said. There were a
25 handful of limited discovery motions that were pending and

1 set for hearing. Not all of the briefing was fully
2 complete since some were filed at different times, not by
3 significant times, but some that were pending ultimately
4 dismissed as moot in light of the stay subject to being
5 re-raised with the Court.

6 We have undertaken a review of those motions, and
7 part of the reason -- many of them are moot and would have
8 no need to be presented to the Court, but part of the
9 reason we had proposed the schedule that we did was the
10 fact that there were some motions for both sides,
11 Defendants as well as Plaintiffs, that were pending.

12 We are certainly happy to discuss those. As I
13 understand the sur-reply filed by Defendants, they offered
14 to do so. If a schedule is set in this case at the same
15 time as the negotiated stipulation sets forth, there is
16 certain informations, financials and other product
17 information, that was agreed to be provided.

18 So it wasn't that we were proposing some wide,
19 unfettered set of discovery. There was a cabined universe
20 that I think the parties fully knew and understood at the
21 time that the stay was lifted.

22 Circling back to the beginning of Defendants'
23 presentation, I do want to just bring the Court back to
24 Personal Audio and the Liqwid/Olaplex, so they were both
25 Plaintiffs in Delaware that I represented. Those cases

1 really -- this case is on all four -- all fours with each
2 of those cases.

3 In Personal Audio, there were eight claims out of
4 a total of about 21 claims that were held invalid by the
5 PTAB, and ultimately the Court, given the stage of the
6 case, which was actually earlier than this case, although
7 substantially along, which is a factor compelling -- or
8 coming out against issuing a stay, the Court ultimately
9 determined the trial should go forward on not just the
10 patentable claims but those that were held preliminarily
11 unpatentable.

12 The same thing -- exact same thing happened
13 respectfully in the District of Delaware. I was lead
14 counsel on that case. It had nothing to do with the fact
15 that there were additional non-patented claims. One of our
16 patents was fully invalidated, full end stop. It remains
17 on appeal to this day. We went and tried that case in
18 large part because claims are entitled to their presumption
19 of validity, particularly in a case where you've got to
20 split set of decisions, some that have been invalidated,
21 some that haven't.

22 And in this instance, like that one in the
23 Liquid/Olaplex versus L'Oreal case, where you're going to
24 be presenting ultimately substantially the same documents
25 and witnesses, it makes a lot of sense for judicial

1 efficiency and party efficiency to try them at the same
2 time.

3 I respectfully disagree with Defendants'
4 assertions about the differences in evidence that would be
5 presented here. As Your Honor -- I know it's been quite
6 some time, but Alacritech had proposed a representative
7 product stipulation. It was never responded to formally or
8 agreed upon by the Defendants.

9 Here -- here nor there, ultimately our experts
10 presented their opinions based on representative products.
11 It's not a universe that is unbound or materially different
12 in any way that's going to be presented at trial.

13 Similarly, Mr. Gunderson offered a damages expert
14 opinion that, yes, has an ultimate number if infringement
15 was found on all of the patents, but we have schedules that
16 are attached like they commonly are as part of a damages
17 report. It breaks it down on a patent-by-patent basis.

18 So the opinions are there. Our expert would not
19 have to supplement his report and would be able to present
20 at trial testimony consistent with WesternGeco that would
21 allow the jury to provide a verdict that is specific to
22 each patent, and, therefore, there's not an issue of
23 inconsistent rulings or an issue of a potential retrial.
24 It would be fully consistent with how the Federal Circuit
25 has told us we're supposed to try patent cases now.

1 THE COURT: Can you point to any other case
2 besides the L'Oreal case from Delaware, which I will look
3 at, where the Court has gone forward with a trial on claims
4 that have been invalidated by the PTAB?

5 MR. PAUNOVICH: Yeah, the Personal Audio is
6 another example. That was Judge Clark in Beaumont. I'm
7 sorry for misspeaking earlier.

8 THE COURT: Now, that case, as I understand it,
9 didn't actually go to trial, but he did lift the stay.

10 MR. PAUNOVICH: I believe it actually did go to
11 trial, but I may be -- I'm sorry, it ended up settling, but
12 ultimately they did agree -- the Court agreed that it was
13 going to go to trial, and then they settled on the eve of
14 trial.

15 THE COURT: Okay. I will look at that one, as
16 well.

17 MR. PAUNOVICH: And just to highlight Judge --
18 Judge Clark, what I think his reasoning was, that
19 ultimately a trial was going to be necessary in that case
20 regardless, and where you had this sort of substantial
21 overlap in the documents and witnesses, et cetera, it
22 didn't justify staying the case in that circumstance. I
23 think that's -- that's very similar and ultimately what
24 happened in Liqwid/Olaplex versus L'Oreal.

25 And in this case, given how long we've waited now

1 and what the negotiated stipulated stay was before, again,
2 we would respectfully request --

3 THE COURT: And so are there any other cases that
4 you can point me to that speak to that?

5 MR. PAUNOVICH: I believe we cited in our briefing
6 at Page -- I want to say 13, but it might have been the
7 Bettcher case, if I'm not mistaken.

8 THE COURT: There is a Bettcher case.

9 MR. PAUNOVICH: And Hologic versus Minerva case.

10 THE COURT: All right. I see those. I'm looking
11 at your table of authorities. I see Hologic and Bettcher.

12 MR. PAUNOVICH: I don't want to misspeak on those.
13 I have a personal knowledge of the Olaplex case, which is
14 why -- and of the Personal Audio we're obviously very
15 familiar with, so I don't want to misstate to Your Honor.

16 THE COURT: Okay.

17 MR. PAUNOVICH: I'm sorry, so Footnote 4 -- I
18 apologize, Your Honor, I want to correct what I've just
19 told you.

20 In Footnote 4 of our Docket No. 470, that's our
21 motion, we list a handful of other cases -- or two other
22 cases in addition to the Olaplex case, the Zoll Medical
23 Corp versus Respironics and One No. Corp versus Google,
24 which reached a similar conclusion --

25 THE COURT: All right.

1 MR. PAUNOVICH: -- as to Personal Audio, that is.

2 THE COURT: Thank you, Mr. Paunovich.

3 MR. PAUNOVICH: Unless Your Honor has any further
4 questions, we appreciate your time.

5 THE COURT: Thank you.

6 MR. PAUNOVICH: Thank you.

7 THE COURT: Anything else from the Defendants?

8 MS. KHACHATOURIAN: Your Honor, if I may speak
9 from here.

10 THE COURT: Sure.

11 MS. KHACHATOURIAN: Just on behalf of Cavium,
12 there was no motion to compel pending against Cavium before
13 the case was stayed at the time of the close of fact
14 discovery. Therefore, fact discovery with respect to
15 Cavium was closed. There was no agreement by Cavium to
16 provide any additional information on products. As far as
17 Cavium is concerned, based on the procedural history of the
18 case, fact discovery had closed, and we were moving
19 forward.

20 Also with respect to Cavium, as Dell also stated,
21 the Broadcom issue applies to Cavium, as well. One of the
22 reasons why we are in this case is -- is to assist Dell and
23 to protect our products, but some of those products include
24 Broadcom.

25 And so in terms of moving forward, it wouldn't

1 make sense. It becomes more complicated.

2 THE COURT: All right. Thank you.

3 MS. KHACHATOURIAN: Thank you, Your Honor.

4 THE COURT: Thank you, Ms. Khachatourian.

5 Anyone else? No?

6 All right. Well, I appreciate the arguments.

7 They've been helpful. We'll get something out promptly on
8 this.

9 MR. PAUNOVICH: Thank you, Your Honor.

10 COURT SECURITY OFFICER: All rise.

11 (Hearing concluded at 4:22 p.m.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
CERTIFIED SHORTHAND REPORTER
State of Texas No.: 7804
Expiration Date: 10/31/2023

7/13/2022
Date